RECORD AND BRIEFS

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No. 17-204

In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

This case is about whether *consumers* have antitrust standing to sue Apple for the commission Apple charges *app developers*. The Ninth Circuit incorrectly held that they do, in a decision that expressly announces a circuit split and cannot be reconciled with this Court's precedent.

Respondents' opposition is built around obfuscating and misrepresenting both the record and the Ninth Circuit's decision. But the Ninth Circuit was, if nothing else, forthright and direct about its holding.

- It held squarely that Apple is subject to suit by consumers solely because it performs the "function" of a "distributor" by handling the delivery of apps to purchasers.
- It stated clearly that nothing else matters—including who is selling what to whom, who sets the price, who collects and distributes the funds from the consumer, and whether the app developers can also sue Apple for treble damages on the exact same commissions. And it never addressed the fundamental question of whether some or all of Apple's commission was passed-through to consumers, signaling that pass-through does not matter either.
- It also acknowledged that its understanding of the law conflicts with that of the Eighth Circuit in *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), a case relied on by the district court. The Ninth Circuit held *Campos* was wrongly decided and embraced its dissent.

Respondents attempt to deny that any of this happened. They deny that the Ninth Circuit created a brand-new "distributor function" rule, even though it systematically explained why Apple's distribution of apps to consumers was the only thing that mattered to its analysis. They deny that the Ninth Circuit's decision creates an irreconcilable split with the Eighth Circuit's decision in *Campos*, even though the Ninth Circuit expressly said so. And they deny—as they tried to deny before the district court—that app developers set app prices, when there is no doubt whatsoever that developers do.

None of these arguments refute the fact that the Ninth Circuit's decision is now the controlling case on the "direct purchaser" doctrine for electronic commerce, especially given the heavy concentration of technology companies in the Ninth Circuit. The decision is wrong and dangerous, and it is imperative that certiorari be granted now.

1. ***Three Factual Corrections.*** The opposition is built around three recurring misrepresentations about facts not genuinely in dispute. Ironically, none are germane to the Ninth Circuit's "distributor function" analysis; they explicitly do not matter under its reading of the law. However, Apple agrees that these are important facts, and responds to correct the record.

First, the opposition strives to convey the impression that consumers are directly harmed by Apple's alleged monopoly by suggesting that Apple "monopolized" an apps market. Respondents' complaint, however, alleges that Apple monopolized the market for iPhone app *distribution*, to wit: "Apple has, from introduction of the iPhone 2G in 2007 through the present, cornered 100% of the worldwide

distribution market for iPhone applications." Pet. App. 41a (¶ 3). It is undisputed here that developers have agreed by contract to pay Apple a 30% commission for (among other things) distribution services. Consumers purchase iPhone apps via Apple's App Store, but they do not purchase the allegedly monopolized service.

Second, Respondents continue to suggest that Apple adds a separate 30% fee "on top of" the final app prices set by developers and paid by consumers, even though it is settled that developers set the prices and consumers do not pay a penny more. Opp. 8 n.2; *id.* at 1, 4. As the district court held and as *amicus curiae* ACT | The App Association confirms, developers own their apps, sell them to consumers via Apple's App Store, and set the exact, final price paid for those apps. The district court took great care to get this issue right, giving Respondents every opportunity to allege that Apple adds its fees "on top of" the final app prices set by a developer. Respondents have never been able to so allege because they know the system does not work that way.

Third, Respondents claim that the app developers "*made no payment whatsoever* to Apple, other than a $99 annual registration fee." *Id.* at 1. That is not true. It is undisputed (and common knowledge) that developers agree contractually with Apple to pay Apple a 30% commission on their sales of paid apps. Apple collects the full price set by the developer for the app, deducts its 30% commission, and remits the balance to the developer. That is a payment to Apple, and even the Ninth Circuit recognized that any particular flow of funds is unimportant. Pet. App. 20a.

2. ***The Circuit Split with Campos.*** Apple cited *Campos* in moving to dismiss the complaint, and the

district court cited *Campos* in dismissing the complaint. The Ninth Circuit then acknowledged that *Campos* considered facts similar to those presented here. But rather than follow *Campos*, the Ninth Circuit disagreed with the Campos majority's legal analysis—adopting the dissent's analysis instead.

Respondents argue there is no circuit split because the two cases apply the same "well-settled law" to different facts, and that the Ninth Circuit only "criticized the way the majority in *Campos* applied *Illinois Brick* [*Co. v. Illinois*, 431 U.S. 720 (1997)] to the factual allegations before it." Opp. 3, 14. That is not a credible reading of the Ninth Circuit's opinion, or the Eighth's. The Ninth Circuit stated that *Campos* dealt with "a transaction closely resembling the transaction in the case before us," but that it "disagree[d] with the majority's analysis in [*Campos*]" because, "[a]s Judge Morris Arnold pointed out in dissent, the majority's 'antecedent transaction' analysis has no basis in Supreme Court precedent." Pet. App. 18a-19a. The Eighth Circuit would consistently reach the opposite outcome in a case like this one, because it understands and applies the legal principles differently. It does not place dispositive weight on whether the defendant performs the "function" of a "distributor," but instead looks to the parties' actual commercial arrangements and to whether adjudication of the plaintiff's claim would require resolution of the pass-through and apportionment problems that the *Illinois Brick* doctrine was designed to eliminate. Under that reading of the law, consumer plaintiffs such as those here, who have not purchased the monopolized distribution service, cannot sue because they cannot be claiming a direct injury. The Ninth Circuit understood

that, which is why it felt obliged to openly disagree with the *Campos* decision. This is a paradigmatic circuit split ripe for this Court's review.

Contradicting themselves, Respondents argue in the "alternative" that the *Campos* legal analysis should be rejected because it wrongly takes account of "antecedent transaction[s]." Opp. 3, 13-16 (citing *Campos*, 140 F.3d at 1169-70 ("An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser.")). Respondents raise this "antecedent transaction[s]" point over a dozen times, as if it were the Eighth Circuit's entire analysis. It is not. The phrase "one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser" is simply a context-specific way of saying "one who claims a pass-through injury." The United States made this exact point in its *Campos amicus* brief.[1] Determining whether the plaintiff is claiming a pass-through injury is plainly an important part of an *Illinois Brick* analysis, if not the object of the exercise. For Respondents and the Ninth Circuit to say that one should not account for that, but should focus on the delivery of goods instead, clearly highlights the circuit split this decision creates.

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[1] Brief for the United States and the Federal Trade Commission as Amicus Curiae 14-15, *Campos v. Ticketmaster Corp.*, 525 U.S. 1102 (1999) (No. 98-127), https://www.justice.gov/sites/default/files/osg/briefs/1998/01/01/98-0127.ami.pet.inv.pdf (explaining that while "[t]he phrasing of that passage may lack some precision," it did not indicate "any departure from or extension of *Illinois Brick*").

3. ***The "Distributor Function" Rule.*** The petition explains how the Ninth Circuit's new "distributor function" rule lacks support in this Court's precedent, and in fact conflicts with them. Respondents' answer is to again deny what is plain on the face of the opinion. They contend that "the Ninth Circuit did not say or imply that its standing analysis began and ended with whether Apple functioned as a distributor." Opp. 7.

Passage after passage, the Ninth Circuit made clear that the appropriate *Illinois Brick* analysis, and its decision, turned entirely on Apple's function as a distributor of apps. In the paragraph that frames the issue, it stated:

> The question before us is whether Plaintiffs purchased their iPhone apps directly from the app developers, or directly from Apple. *Stated otherwise, the question is whether Apple is a manufacturer or producer, or whether it is a distributor.* Under *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, if Apple is a manufacturer or producer from whom Plaintiffs purchased indirectly, Plaintiffs do not have standing. But *if Apple is a distributor from whom Plaintiffs purchased directly, Plaintiffs do have standing.*

Pet App. 17a. (emphasis added). The Ninth Circuit then said "[t]he key to the analysis is the function Apple serves," and took pains to explain that nothing else mattered: not "whether Apple sells distribution services to app developers," not the "payment or bookkeeping arrangements," not the "form of the payment Apple receives in return for distributing

iPhone apps," and not pricing mechanics or "who determines the ultimate price paid by the buyer of an iPhone app." Pet. App. 19a-21a. If there remained any doubt, the Ninth Circuit eliminated it by concluding that:

> Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store. Because Apple is a distributor, Plaintiffs have standing under *Illinois Brick* to sue Apple for allegedly monopolizing and attempting to monopolize the sale of iPhone apps.

Id. at 21a.

4. ***The Role of Pass-Through and Duplicative Recovery.*** The petition details how the Ninth Circuit's focus on the marketplace function of distributing goods to consumers is indifferent to the pass-through, apportionment and double-recovery concerns that animate this Court's *Illinois Brick* case law and the relevant precedents of other circuits. The Ninth Circuit stated that it *did not matter* whether app developers might have a parallel cause of action to recover exactly the same 30% commissions as damages (trebled). Respondents are unable to defend those features of the Ninth Circuit's approach, so they attempt four obfuscation strategies.

First, Respondents assert that the Ninth Circuit "conclude[d] that apps purchasers were the direct victims of the monopolistic overcharge and that the damage was not passed on to them by the app developers or anyone else, but rather was imposed on them by Apple," and that therefore "there is no question that purchasers of apps first paid the

overcharge." Opp. 10. This bears no resemblance to anything the Ninth Circuit held. *See* Pet. App. 20a. Of course it is undisputed that Apple collects the full payment from consumers, remitting 70% of it to the developers, but the Ninth Circuit held that that is irrelevant. *See id.* ("We do not rest our analysis on the fact that Plaintiffs pay the App Store, which then forwards the payment to the app developers, less Apple's thirty percent commission."). It is also undisputed that developers set app prices, and do so against the backdrop that Apple will take a 30% commission. As a matter of basic economics, whether that commission will affect the price the developer otherwise would have charged (i.e., whether the developer will "pass through" or instead absorb the commission) depends on demand for that particular app and the substitutes available in the market. The Ninth Circuit could not and did not hold that there is no issue with pass-through dynamics or apportionment given the facts here; it ignored the issue altogether.

Respondents' second strategy is an elaborate and confusing effort to pretend that Apple is advancing a damages argument, not an *Illinois Brick* issue. *See* Opp. 10-12. This is not true. Apple has never argued, for example, that "absent the [alleged] monopoly [consumers] would have paid the same 30% commission to the apps developers." *Id.* at 10. Apple is focused on the way the world is: app developers set app prices knowing they will have to pay Apple a commission. They must therefore determine their own pass-through strategy, app-by-app. The decisions they make determine how consumers are affected by the commission and any allegedly supracompetitive component of it.

No one needs to figure that out if the developers sue, because they are the direct purchasers of the service. In developer litigation there is a *damages* issue—how much of the 30% commission is allegedly in excess of the competitive commission rate? But whatever that may be, the developers are entitled to 100% of it as direct purchaser damages, regardless of whether they absorbed it all or passed it on. That is what *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* holds. *See* 392 U.S. 481, 489, 492 (1968). The problem here is that one *does* need to figure out the pass-through rate if consumers sue, because otherwise the damages estimates will be wrong. That is what *Illinois Brick* holds cannot happen—and why Respondents' claim is barred.

Respondents' third strategy is an effort to disenfranchise app developers from their claims. Opp. 12-13. There is nothing in this Court's *Illinois Brick* doctrine that permits indirect purchaser suits because those purchasers claim there are substantive defenses to direct purchaser claims. If anything, Respondents' effort to avoid duplicative litigation concerns by undermining the claims of another potential plaintiff group is a strong reminder of why we have an *Illinois Brick* doctrine.[2]

Finally, Respondents have no real answer to the Ninth Circuit's indifference to duplicative recoveries. The Ninth Circuit recognized that if "app developers are direct purchasers of distribution services from

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[2] We agree with Respondents that app developers benefit enormously from Apple's iPhone ecosystem, which may explain why no developer has brought a claim like this one. But by hypothesis, any developer who sued Apple would see things differently.

Apple," it "would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit" based on Apple's 30% commission. Pet. App. 20a. Nonetheless, the Ninth Circuit expressly held that "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis." *Id.* The petition explained that the Ninth Circuit's indifference to that issue is an outright dismissal of the duplicative recovery concerns underlying *Illinois Brick*, stark enough to warrant summary reversal. Indeed, the decision appears to *invite* duplicative recovery.

Respondents discuss this passage only in a footnote, suggesting that the issue "would be determined by the court if and when the apps developers were to bring such a claim." Opp. 13 n.3. In text they suggest that there is no problem because any claim by the developers would be for "a piece of the same 30% pie." *Id.* at 12. Those are admissions that there *is* a potential for duplicative recovery, in which case two plaintiff groups would fight over "the same 30% pie." In other words, the court in that case (and therefore this one as well) would need to apportion the harm allegedly caused by Apple's commission between the developers and consumers. *See id.* at 12-13. But that exercise is the very thing that *Illinois Brick* places off limits, by mandating that the entire cause of action be placed in the hands of a single plaintiff—the direct purchaser.

Respondents' suggestion that apportionment would be manageable is precisely the position of the *Illinois Brick* dissent. *See* 431 U.S. at 761-65 (Brennan J., dissenting). But this Court disagreed, *see id.* at 731-32, and has since rejected arguments for exceptions to the

Illinois Brick rule when plaintiffs have argued that apportionment would, on the facts of a particular case, be manageable. *See Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 217 (1990). The settled law has been that the mere possibility of duplicative recoveries requires giving the entire claim to the direct purchasers. *See Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC*, 763 F.3d 1280, 1285 (11th Cir. 2014)) (direct purchaser rule intended to "eliminate[] the possibility ... [of] duplicative recoveries"); *Cohen v. Gen. Motors Corp. (In re New Motor Vehicles Canadian Export Antitrust Litig.)*, 533 F.3d 1, 5 (1st Cir. 2008) ("risk of duplicative recovery"); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 967-68 (3d Cir. 1983) (*Illinois Brick* requires examining whether "allowing those persons to sue could create the possibility of duplicative recovery"), *cert. denied*, 465 U.S. 1024 (1984). The Ninth Circuit ignored that principle in order to ensure that end-consumers would always have a cause of action—again, precisely the position urged by Justice Brennan in dissent in *Illinois Brick*.

5. ***These Are Issues of National Importance.*** This case presents issues of national importance given the increasing prevalence of electronic commerce and the agency sales model. Many of the world's leading ecommerce companies are headquartered within the Ninth Circuit, and plaintiffs' attorneys will now have every incentive to file suit there. Thus, the Ninth Circuit has effectively established the contours of the "direct purchaser" doctrine as applied to electronic commerce for the entire country.

If that is in doubt, the Court should call for the views of the United States. The Solicitor General opined on these issues in *Campos*, stating that the

decision was correctly decided. Apple believes the United States would hold to the same position, disagree with the Ninth Circuit's decision, and find the issue worthy of immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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